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No. 00-860

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CORRECTIONAL SERVICES CORPORATION,
Petitioner,

v.

JOHN E. MALESKO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTRODUCTION

The issue presented in this case is not, as Respondent and his *amici* would have it, whether privatization of federal prisons is good policy or whether Correctional Services Corporation ("CSC") is entitled to sovereign immunity. The issue is whether the implied cause of action against federal officers for damages arising from constitutional violations, see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be extended to private entities acting under color of federal law. CSC and the Government showed in their opening briefs that this Court should not do so because such an extension would serve neither of the purposes underlying *Bivens*—to wit, it would neither enhance deterrence of constitutional violations by individual officers nor provide a remedy where none otherwise exists.

Indeed, the logic of this Court's decision in *FDIC* v. *Meyer*, 510 U.S. 471 (1994), simply cannot accommodate the extension of *Bivens* to private entities. *Meyer* makes clear that the core purpose of *Bivens* is the deterrence not of corporate entities, but of individual actors—*i.e.*, the people who set and implement policies—and further that a *Bivens* remedy is appropriate only where a plaintiff lacks any other remedy. Where, as here, it has been assumed that the plaintiff could have brought a *Bivens*-type action against the CSC employees who allegedly injured him by creating, implementing, or violating a CSC policy, the requisite deterrence of and remedy for constitutional violations already exists, and *Bivens* should not be extended.

The fundamental difference between the parties in this case is found in their entirely distinct views of the role of the *Bivens* action. CSC and the Government contend that a *Bivens* action is a gap-filler, a judicially created solution for the problematic situation created when there is no deterrence of, nor any damages remedy for, constitutional violations

committed by individual federal officers. Respondent and his *amici* treat *Bivens* as a full-blown statutory scheme, akin to Section 1983, establishing and implementing remedies for any and all constitutional violations under color of federal law. But precisely because the *Bivens* action is a judicial—not a congressional—creation, it extends only as far as necessary to fill the gaps identified by this Court in the line of cases following *Bivens*.

Even where a gap exists, a *Bivens* action will be implied only if there are no "'special factors'" that counsel against doing so. *Meyer*, 510 U.S. at 486. CSC and the Government showed that "[r]ecognizing an additional *Bivens* damages action directly against correctional corporations in this context has the potential of impeding the BOP's [Bureau of Prisons'] implementation of important correctional programs" and would place an additional burden on federal fiscal interests. Gov't Br. 10, 26-28. And CSC's and the Government's view has the added virtue of treating federal prisoners consistently: Federal prisoners in facilities operated by either the BOP or a private contractor may bring *Bivens* actions against individuals acting under color of federal law, but not against the entity holding the prisoners. By contrast, Respondent's proposed extension would grant federal prisoners in private, but not public, facilities a *Bivens* action against the entity holding them.

CSC's and the Government's approach best comports with this Court's "cautious[]" response to proposals for new extensions of *Bivens*. *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). Exercise of such caution is fully warranted here. The decision below, extending *Bivens* to a context in which none of its purposes would be served, should be reversed.

ARGUMENT

I. EXTENDING *BIVENS* TO PRIVATE ENTITIES WOULD UNDERMINE, NOT ADVANCE, THE PURPOSES OF *BIVENS*.

As demonstrated in CSC's and the Government's opening briefs, the cause of action for damages created in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), only will be extended where it *both* (i) would deter an individual officer by exposing him personally to the direct threat of litigation and liability if he unconstitutionally abuses his federal authority *and* (ii) would provide damages for a constitutional violation that lacks an alternative remedy. See Pet. Br. 8-18; Gov't Br. 18-26. Enlarging *Bivens* to include actions against private entities such as CSC would serve neither of these purposes.

A. Extending *Bivens* To Private Entities Will Undermine Its Core Deterrence Rationale.

1. Respondent posits that "[t]he only limit this Court has recognized on *Bivens*' reach is for . . . entities entitled to invoke absolute sovereign immunity." Resp. Br. 7. This contention does not withstand even cursory scrutiny. As an initial matter, as is plain from its opening brief, CSC does not claim (either "overtly" or covertly) that it is entitled to sovereign immunity. *Id.* at 16. More importantly, this Court has rejected the claim, repeated throughout Respondent's brief, see *id.* at 4, 7-8, 10, 12-18, that the scope of *Bivens* is in any way linked to the scope of sovereign immunity. Indeed, in *Meyer*, the Court rejected the lower court's "conflat[ion]" of the sovereign immunity and *Bivens* analyses, terming them "two 'analytically distinct' inquiries." *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994). As such, courts consider separately whether sovereign immunity precludes liability and whether *Bivens* "provides an avenue for relief." *Id.* As the *Meyer* Court unanimously held, a federal corporation, the Federal Deposit Insurance Corporation ("FDIC")—*which had no*

sovereign immunity—still was not amenable to a *Bivens* suit. *Id.* at 486. The question whether CSC is entitled to sovereign immunity is simply irrelevant to whether extending *Bivens* is appropriate given its logic and purpose and the presence of special factors counselling hesitation. *Id.* at 483-86.

2. As the Court unanimously held in *Meyer*, "the purpose of *Bivens* is to deter *the officer*." *Id.* at 485 (emphasis in original). Deterrence, in the *Bivens* sense, operates on the behavior and motivations of an individual, natural person, not on an entity or artificial person. See Pet. Br. 9-13. The quintessential *Bivens* defendant (indeed, the only *Bivens* defendant ever recognized by this Court), is an individual federal officer—either a line agent directly interacting with the public or an administrator directly setting an entity's policies.

The Court never has held that an entity—even one that enjoys no sovereign immunity (such as the FDIC in *Meyer*)—is amenable to a *Bivens* action. Contrary to Respondent's suggestion, the Court's distinction between individuals and entities is no "arcane" "pleading trap," Resp. Br. 29, but a core analytical distinction based on the purpose and logic of *Bivens* to deter and to fill a remedial gap. As shown in CSC's opening brief, deterrence in the *Bivens* sense specifically targets the threat and pains of litigation at those individuals who actually interact with, and set policies impacting, the public and who are directly responsible for unconstitutional conduct. Pet. Br. 9-13.[1]

3. As shown in CSC's opening brief and explained in *Meyer*, if entities were amenable to *Bivens*, these deterrent effects would be undermined. Pet. Br. 11-13; *Meyer*, 510

[1] Furthermore, Respondent and his *amici* ignore that the Court has held that *Bivens* deterrence is not undermined even where an individual officer has qualified immunity (or, as here, a possible good faith defense), is indemnified against constitutional torts, and is acting pursuant to an entity's policy. *See* Pet. Br. 10-11 & nn.7 & 8; *see FDIC* v. *Meyer*, 510 U.S. 471, 473, 474, 486 (1994).

U.S. at 485; cf. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) ("[A] damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a government employer."). Respondent does not dispute that entities are more attractive litigation targets. See 13 & n.12, *infra*. Thus, if *Bivens* liability were expanded, plaintiffs would tend to sue, and to enforce judgments against, entities to the exclusion of the individuals responsible for the unconstitutional conduct. In such a case, "the deterrent effects of the *Bivens* remedy would be lost." *Meyer*, 510 U.S. at 485. Deterrence in the *Bivens* sense is achieved by targeting individual officers to the exclusion of the employing entity.

4. Respondent and his *amici* assert that a *Bivens* action is necessary to cure systemic problems and to deter an entity from making and enforcing unconstitutional policies, but this contention fails. First, because plaintiffs can bring *Bivens* actions against individuals who directly make policy for federal entities and entities acting under color of federal law, it plainly is not necessary to have a *Bivens* action against the entity. See I.B., *infra*. In any event, there is no policy at issue here. Despite Respondent and his *amici*'s characterization, Respondent has not clearly pled that his injuries were caused by a CSC policy. To the contrary, Respondent concedes that CSC's policy was that, "because of his illness, Mr. Malesko was *allowed* to continue to use the elevator." Resp. Br. 1 (emphasis added). Subsequently, and in violation of this CSC policy, it was an individual CSC guard who "compelled Mr. Malesko to take the stairs to his room" despite being reminded that Respondent "was allowed to use the elevator." Resp. Br. 1-2.[2] But, even if this case squarely

[2] There is no allegation that CSC had any policy, or took any action, that precluded Respondent from obtaining his medication. J.A. 13; *see* Gov't Br. 6 n.3 (noting that "residents generally are responsible for the costs of their medical and dental care" except "'[i]n an emergency'") (quoting BOP, *Statement of Work for Community Corrections Center* 88

involved a CSC policy, it is axiomatic that corporations act only through their officers and agents. See Gov't Br. 21 n.11.

5. Respondent's and his *amici*'s suggestion that *Bivens* is necessary to deter the wrongdoing, and to provide proper oversight and accountability, of entities such as CSC overlooks the fact that there already are numerous mechanisms for ensuring direct and indirect scrutiny and oversight of entities. First, as discussed below, there are already appropriate judicial means to hold entities directly accountable in tort. See I.B., *infra*.

Second, entities such as CSC already are subject to "extensive" BOP "oversight and enforcement" including "contract monitoring and performance evaluation." Gov't Br. 25. In particular, CSC must comply with the BOP's voluminous *Statement of Work*, detailing numerous policies and standards designed to protect inmates. Indeed, CSC risks losing its contract if it does not meet these standards. Given that there are few, if any, alternative buyers besides the government, entities such as CSC have a powerful incentive to satisfy the BOP's standards. Moreover, the BOP remains under direct public scrutiny and political pressure to take care in monitoring entities, such as CSC.

Third, as a publicly traded company, CSC is subject to extensive and ongoing reporting requirements in the securities markets that provide broad disclosure to the public. See, *e.g.*, Resp. Br. 16, 22 (citing CSC's Form 10K). Moreover, a corporation is directly responsible to its shareholders, and would have difficulty attracting new investment and retaining current investment if its employees behave unconstitutionally, thereby subjecting them to substantial liability and the company to adverse publicity.

(Dec. 2000)) (alteration in original). Moreover, despite Respondent's new theory that CSC somehow "fail[ed] to train and supervise" its employees, Resp. Br. 4, he made no such allegation in his complaint.

Fourth, as is plain from Respondent's *amici*'s citation to newspaper accounts of alleged correctional abuses, there already is substantial media oversight and access to correctional facilities. This is particularly true at a Community Correctional Center, such as the facility at issue here, where inmates have substantial interaction with the outside world. See Gov't Br. 2-4.[3] Finally, plaintiffs always can bring a *Bivens* suit against the wrongdoing individual officer.

Accordingly, the opposition's unsupported assertion that it is somehow efficient for a profit-making entity such as CSC to cut constitutional corners, defies reality. Resp. Br. 22; ACLU Br. 4. Extending *Bivens* to entities such as CSC is neither necessary (nor sufficient) to deter unconstitutional conduct given the myriad mechanisms that already exist to ensure government and public oversight.[4]

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[3] Despite Respondent and his *amici*'s assertion that private facilities are inherently more troubled and more prone to constitutional violations than are their public counterparts, in fact, the same study cited by the Legal Aid Society of the City of New York ("LAS"), *see*, *e.g.*, LAS Br. 8, concludes that "private prisons operate much the same as public facilities," "function as well as publicly operated prisons," and tend to have "the same staffing patterns; provide the same levels of work, education, and counseling programs for inmates; and have the same rate of serious inmate misconduct as public facilities. The few credible impact studies show more similarities and fewer differences between the two methods of operation." Bureau of Justice Assistance, U.S. Dep't of Justice, *Emerging Issues on Privatized Prisons* ix, x, 59 (Feb. 2001). In sum, such comparisons "cannot be used to conclude that either a private or a public prison is superior to the other." *Id.* at 47.

[4] If anything, LAS's litany of "patterns of abuse" at various *State* entities, LAS Br. 11-16, which are amenable to Section 1983 liability, indicates that extending *Bivens* to entities would not solve the problems LAS identifies. LAS's submission simply substitutes sensationalism for legal analysis.

B. Plaintiffs In Respondent's Position Already Have Appropriate Alternative Remedies.

1. Although Respondent and his *amici* do not dispute that individual CSC officers are appropriate *Bivens* defendants, they virtually ignore these potential defendants in insisting that a *Bivens* remedy is needed against CSC.[5] This approach is not surprising. Just as the plaintiff in *Meyer* sought to sue the FDIC as an end run around the individual FDIC officer's qualified immunity, Respondent seeks to sue CSC because his *Bivens* claims against CSC's officers are time-barred.

Respondent's current inability to pursue *Bivens* claims against individual officers is the result of a self-inflicted wound. Indeed, Malesko waited until nearly three years following the incident, on the eve of the expiration of the statute of limitations, to bring suit and did not identify a particular officer until his amended complaint, nearly five years after the alleged incident.[6]

Accordingly, the difference between the parties is clear. CSC and the Government believe that a federal inmate held in a CSC facility should have the same rights as one held in a BOP facility: namely, the right to sue the individual rogue agent or policymaker directly responsible for an alleged constitutional violation, but not the entity. Respondent and his *amici*, by contrast, believe that the CSC inmate should

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[5] Respondent and the courts below have assumed that CSC's individual officers would be amenable to a *Bivens* suit. *See* Pet. Br. 13-14. CSC does not "ignore[] the fact that Mr. Malesko could presumably sue CSC's chief executive officer, just as an inmate in a government-run prison could sue the director of BOP." Resp. Br. 29. In fact, all involved in this case have *presumed* that *any* officer who directly violates the Constitution under color of federal law is amenable to a *Bivens* suit—as is the director of the BOP.

[6] Respondent does not challenge the holdings below that this belated attempt to name individual defendants was time-barred. Resp. Br. 2.

have an *additional* cause of action against the entity. There is no justification for that proposed disparity.[7]

2. Respondent's arguments about the potential difficulties of suing individuals, as opposed to entities, do not warrant creation of a *Bivens* action against entities. First, while individuals are more likely than entities to have "shallow pockets" or to be judgment proof, this phenomenon is equally likely with regard to public officers. In any event, as shown above, providing access to entities severely undermines the *Bivens* deterrence rationale (see I.A., *supra*).

Similarly, Respondent's claim that entities are more desirable litigation targets because they are easier to identify than individuals does not support an extension of *Bivens* to private entities. This claim, if true, would be equally problematic in the public context. In all cases, the proper course instead is to sue the individual wrongdoers as "John Does" and utilize ordinary discovery mechanisms, such as propounding interrogatories, to learn their identity.[8] A plaintiff also could utilize non-litigation mechanisms to seek the identity of an individual wrongdoer, such as making inquiries through the BOP's Administrative Remedy Program. See generally Pet. Br. 16-17 & n.16; Gov't Br. 24 & n.15.

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[7] Moreover, to the extent private correctional employees (as opposed to public correctional employees) may not be entitled to qualified immunity, if anything, a plaintiff such as Respondent would have a more effective *Bivens* remedy than his publicly held counterpart. *See* Pet. Br. 10 n.7; *Richardson* v. *McKnight*, 521 U.S. 399, 412 (1997); *but cf. id.* at 413 (limiting holding, noting "[t]he case does not involve a private individual . . . serving as an adjunct to government in an essential governmental activity, or acting under close official supervision"). In *Meyer*, by contrast, the individual officer was protected by qualified immunity, leaving that plaintiff with no practically effective *Bivens* remedy.

[8] Here, of course, Respondent brought a John Doe *Bivens* suit against individual officers but failed to utilize discovery to learn their names and to amend his complaint in a timely manner. *See* 8 & n.6, *supra*.

3. In addition to the assumed *Bivens* remedy against individual CSC officers, Respondent concedes that plaintiffs in his position have damages remedies under State law. See Resp. Br. 18-19, 36; Resp. Pet. Opp. 13. Although urging that only Congress and the federal courts can protect federal rights, Respondent does not show why available State remedies would be inadequate to provide the damages he seeks in this case.[9] Indeed, Respondent does not answer CSC's point that plaintiffs in his position likely will have an easier time prevailing (and recovering damages) under State law standards (*e.g.*, by showing negligence) than under heightened Eighth Amendment "'deliberate indifference'" standards. Pet. Br. 15 (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976)). In any event, federal inmates assigned by the BOP to private and public facilities generally may sue both individual officers and entities through State tort law or, for those in public facilities, through the analogous federal tort remedy under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq*. See Gov't Br. 11-12. These tort remedies, combined with *Bivens* remedies against individual officers, are adequate for *all* federal prisoners. *Id.*

4. Finally, as CSC has shown, many other mechanisms ensure oversight and accountability of entities. Pet. Br. 16-18. For example, the Court recently has emphasized the importance with which Congress views the Administrative Remedy Program at least as a vehicle to "produce administrative results that would satisfy at least some inmates" and a useful "filter [of] some frivolous claims." *Booth* v. *Churner*, — U.S. —, —, 121 S. Ct. 1819, 1823

[9] Despite Respondent's repeated citation to *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), and history as support for expanding *Bivens* here, there was no *Bivens* cause of action at all for nearly 170 years. Moreover, as shown in CSC's and the Government's opening briefs and below, the Court is properly reluctant to imply causes of action where Congress has not acted, unless certain rigorous conditions are met. *See* III., *infra*.

(2001) (holding that this process must be exhausted before seeking money damages under Section 1983).

Respondent is therefore left in the same position as the plaintiff in *Meyer*: he may sue the individual officer under *Bivens*, and he may pursue remedies against the institution in tort, but he may not sue the entity in a *Bivens* action. CSC's and the Government's position, unlike respondent's, treats all federal prisoners equally while properly promoting *Bivens*' deterrence and remedial purposes.

II. SPECIAL FACTORS COUNSEL AGAINST EXTENDING *BIVENS* TO PRIVATE ENTITIES.

Where "'special factors counsel[] hesitation,'" extending *Bivens* is "inappropriate even if such a remedy were consistent with *Bivens*," *FDIC* v. *Meyer*, 510 U.S. 471, 486 (1994), and regardless of "whether the laws currently on the books afford [a plaintiff] an 'adequate' federal remedy for his injuries," *United States* v. *Stanley*, 483 U.S. 669, 683 (1987). See Pet. Br. 18-31. The range of factors considered in this analysis is broad and context sensitive. *Id.* at 18-19. Extending *Bivens* here would injure at least two sets of interests within Congress's particular institutional competence by interfering with federal fiscal policy and by creating disparate treatment that is contrary to logic, equity, and congressional privatization policy. See *id.* at 20-31. Special factors are implicated in this case, and extending *Bivens* to private entities therefore would be inappropriate.

A. Expanding *Bivens* To Government Contractors Would Threaten Federal Fiscal Policy.

Interference with federal fiscal policy is a "special factor[] counseling hesitation."[10] *Bivens* v. *Six Unknown Agents of*

[10] Respondent's challenge to this conclusion is baffling. Resp. Br. 11. *Bivens* stated that interference with federal fiscal policy could be a "special factor[] counseling hesitation," 403 U.S. at 396, and *Meyer* relied on that factor in refusing to extend *Bivens* to the FDIC, 510 U.S. at 486.

Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971). With due respect for Congress's role in spending decisions, the Court rightly hesitates to distort public choice, directly *or* indirectly. Because extending *Bivens* to government contractors would impact the federal fisc, hesitation is warranted here. Pet. Br. 20-23; Gov't Br. 26.

1. Respondent argues that the Court should ignore the effect on the fisc caused by increased liability of government contractors because that impact would be indirect. But, this Court rejected this argument in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988). *Boyle* reflects the practical reality that if private entities are subjected to higher liability risks while providing services to the government, entities will either raise their prices or refuse to provide those services. *Id.* at 507. This, in turn, will affect the federal fisc, *i.e.*, by increasing the price that the government pays or by removing options for service. The harm to the federal fisc will be no less significant because it is indirect. See Pet. Br. 20-21 & n.17 (analyzing effect of increased government contractor liability on federal fisc).

2. Respondent's analysis also judges the effect that increased liability would have on the availability and cost of insurance. As CSC has explained, insurers (being rational actors) will require higher premiums for providing coverage to entities subject to increased risk of liability—and may require higher premiums for all affected entities in order to spread the risk. *Id.* at 21-22 & n.18. Thus, even cautious contractors would have higher insurance premiums, to be passed on to the government. Similarly, any liability that exceeds policy limits would likewise be passed on to the government.

3. The fact that CSC, like the government, may voluntarily[11] indemnify its employees is irrelevant. While

[11] In claiming that CSC is obligated to assume its employees' liability, Respondent overreads the BOP *Statement of Work*'s provision that "[t]he contractor shall be responsible for all litigation, including the cost of litigation, brought against it, its employees or agents for alleged acts or omissions." BOP, *Statement of Work for Community Corrections Center* 5 (Dec. 2000). Respondent asserts an obligation on CSC's part to indemnify its employees, but while the *Statement of Work* requires contractors to bear *litigation costs*, it never mentions *indemnification* or *assuming liability*.

arguing that indemnification means that CSC would suffer no additional financial pain from direct liability under *Bivens*, Respondent does not dispute that "it is well documented that corporations fare worse before juries than do individuals"—with increased risk of being found liable and, if found liable, of having larger damage awards assessed against them. See Gov't Br. 20 n.10. Indeed, this Court has acknowledged that corporations may be subject to unduly large verdicts as compared to individual defendants. See *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (plurality). In sum, permitting plaintiffs to sue private corporations under *Bivens* creates problems,[12] including undue risk of larger damages and attendant harm to federal fiscal policy, that counsel against extending *Bivens*.

B. Expanding *Bivens* Is Contrary To Logic, Equity, And Congressional Privatization Policy.

Contractors, such as CSC, share key attributes with the entity whose task they perform—here, the BOP—and with the FDIC, the entity at issue in *Meyer*. CSC does not, and need not, claim that private entities are *identical* to federal agencies or government corporations. Rather, CSC focuses on critical traits showing that CSC, the BOP, and the FDIC should have the same *Bivens* liability, as a matter of logic,

[12] Another consequence of the prejudice against corporations is that extending *Bivens* here would give plaintiffs "a significant incentive to bypass suit against—and thus diminish the deterrent effect on—the individual officer," Gov't Br. 21 n.10. *See also* I.A., *supra*; Pet. Br. 11-12.

equity, and policy. Thus, the Court should decline to extend *Bivens* to private entities such as CSC.

1. Private entities operating prisons on behalf of the BOP serve the same function as does the BOP and, "[t]o the extent those entities exercise federal authority, they exercise that authority on behalf of—they stand in the shoes of—the BOP itself in pursuit of the Bureau's penological mission." Gov't Br. 24-25; see Pet. Br. 24-25. This fact has three consequences. First, it is illogical and inequitable to analogize CSC to the BOP in deciding if it is engaging in federal action but not when deciding whether it should be subject to *Bivens* liability. Pet. Br. 24; *Kauffman* v. *Anglo-American Sch. of Sofia*, 28 F.3d 1223, 1226 (D.C. Cir. 1994). Second, it is equally illogical and inequitable to treat federal prisoners differently solely because they are held, not by the BOP, but by a private prison. Pet. Br. 26 n.21; Gov't Br. 23. Third, as shown by the Government, the BOP maintains "extensive administrative and contractual oversight" over private prisoner providers, thus "mak[ing] it particularly difficult to justify a differential rule for BOP-regulated and BOP-operated institutions." Gov't Br. 25. Private prison providers, including CSC, act as arms of the BOP and, like the BOP, should not be amenable to *Bivens*.

2. Respondent has not, and cannot, deny that at least three central points of similarity exist between federal government corporations, such as the FDIC, and government contractors, such as CSC: (1) each has a separate legal personality from the federal government; (2) much of each entity's funding comes from nonfederal sources; and (3) neither entity is protected by sovereign immunity. See Pet. Br. 26-27. Respondent lists various distinctions between CSC and the FDIC, see Resp. Br. 25, but each is irrelevant to this analysis.[13] For example, the fact that the President appoints

[13] Similarly, Respondent notes throughout his brief that private entities are not subject to the civil service rules—but ignores that government corporations, such as the FDIC, are not covered by most relevant civil service rules. *See* 5 U.S.C. § 2302(a)(2)(C)(i) (but barring retaliation against whistleblower covered by Section 2302(b)(9)).

members of the FDIC's board of directors does not affect the FDIC's financial situation or lack of sovereign immunity.

3. Respondent's assertion that CSC is "[l]ike a federal employee," Resp. Br. 27, is not convincing. This claim relies on an incorrect reading of *Carlson* v. *Green*, 446 U.S. 14 (1980). *Carlson* did not hold that the BOP director could be sued under *Bivens*, even if he or she did not "ha[ve] any role" in a wrong alleged by an inmate. Resp. Br. 28. Rather, *Carlson* involved a motion to dismiss on *jurisdictional* grounds, and the parties *agreed* that the plaintiff had stated a claim of deliberate indifference under the Eighth Amendment against *each* defendant. 446 U.S. at 16-18 & nn.1, 3. Thus, *Carlson* does not hold that a defendant may be liable under *Bivens* for a wrong in which the defendant had no role.[14] And *Carlson*, where the only defendants were officers, *id.* at 16, did not raise the issue of whether *entities* may be liable under *Bivens*. Every other premise of the analogy between CSC and a federal officer, as shown in our opening brief and in this brief, is similarly flawed.[15]

4. It is beyond cavil that Congress has an express policy in favor of privatization generally, and in favor of Community Correctional Centers such as those run by CSC in particular. See Pet. Br. 28-31; Gov't Br. 3-4, 27. Respondent and his

[14] While Respondent implies that *respondeat superior* is permissible under *Bivens*, every court of appeals that has addressed the issue has rejected such derivative liability. *See, e.g.*, *Ruiz Rivera* v. *Riley*, 209 F.3d 24, 28 (1st Cir. 2000) (collecting cases).

[15] These arguments include Respondent's emphasis on sovereign immunity, analysis of the role of civil service in *Bivens*, claim that the government requires CSC to indemnify its own employees, incorrect reading of deterrence under *Bivens*, and analogy between CSC-held federal prisoners and state prisoners. *See* Resp. Br. 28-34. This amalgam of flawed arguments cannot weaken the analogies between CSC, the BOP, and the FDIC, nor does it show that CSC is like an employee.

amici do not dispute the policy's existence, but instead, engage in an improper, irrelevant debate on its wisdom. Congress's manifest determination to privatize certain prison functions is a factor counselling hesitation in extending *Bivens* here. Respondent also asserts that, because Congress did not exempt private entities from *Bivens* liability in light of pre-*Meyer* lower court decisions assuming such liability, Congress must have intended for *Bivens* to apply here. But, legislative silence certainly does not indicate that "Congress has ratified holdings of some of the Courts of Appeals." *United States* v. *Wells*, 519 U.S. 482, 496 (1997) (It "'is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.'") (quoting *NLRB* v. *Plasterers' Local Union No. 79*, 404 U.S. 116, 129-30 (1971)).[16] See also Pet. Br. 8 n.5 (explaining that pre-*Meyer* cases are not good precedent for the claim that *Bivens* applies to private entities). Legislative silence is particularly suspect where, as here, it is unlikely that Congress even considered the question at hand.

5. Finally, Respondent ignores the impact that extending *Bivens* to private entities such as CSC will have on federal procurement policy in the prison setting. The government seeks to choose providers (public or private) based on which entity serves prisoners and society more effectively—an analysis that balances safety, recidivism, and protection of constitutional rights. This decision should not be distorted by the fact that private, but not public, providers are subject to *Bivens* liability, with its attendant risks of increased costs.

[16] Indeed, given that neither Congress nor this Court has ever held that entities—private or public—are subject to *Bivens* liability, "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom* v. *Roemer*, 501 U.S. 380, 396 n.23 (1991) (citing *Harrison* v. *PPG Indus.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)); *see also Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 588, 589 (1982) (accepting less drastic, "unremarkable" statutory interpretation in the face of legislative silence because "the fact that the dog did not bark can itself be significant").

See Gov't Br. 28. To say that a private entity's protection of constitutional rights is *one* factor in the government's contracting decision is not, as the ACLU states, to denigrate such rights. They are an important component in choosing providers, and government choice should not be distorted by adding in higher liability for private, but not public, entities. Accordingly, the Court should refuse to extend *Bivens* to private entities, just as it refused to extend *Bivens* to public entities.

III. SECTION 1983 IS IRRELEVANT WHEN DECIDING WHETHER TO EXTEND *BIVENS*.

Respondent and the ACLU seek to analogize *Bivens* actions to Section 1983 actions to show that private corporations are amenable to suit under *Bivens*. The analogy is totally inapt for several reasons. See Pet. Br. 32-35.

1. Most importantly, *Bivens* is a narrow, judge-made gap filler with a specific goal of deterring individual officers from violating the Constitution. Section 1983, by contrast, is part of an expansive congressionally created statutory scheme providing an all-purpose action for "monetary, declaratory, or injunctive relief," *Monell* v. *Department of Social Services*, 436 U.S. 658, 690 (1978), against "[e]very person," natural or artificial.

2. The analogy to Section 1983 ignores the fundamental distinction between the question of whether a defendant is amenable to suit under *Bivens* and the question of how to apply *Bivens* to a defendant covered by *Bivens*. Pet. Br. 34. As a consequence of this distinction, Section 1983 is relevant only to questions of application—not of amenability. *Id.*; *Butz* v. *Economou*, 438 U.S. 478, 503 (1978). Respondent and the ACLU's failure to accept this core distinction is clear, for *all* of the cases that they cite in support of their analogy involve application—not coverage.[17]

[17] *See Wilson* v. *Layne*, 526 U.S. 603, 609 (1999) (qualified immunity); *Graham* v. *Connor*, 490 U.S. 386, 394 & n.9 (1989) (excessive force);

3. Respondent and the ACLU also ignore CSC's and the Government's strong showing that, while *Bivens* is limited to *officers*, Section 1983 applies to the broader class of *persons*. This analysis, grounded in Section 1983's text and history, illustrates the wisdom of the Court's refusal to consider Section 1983 in determining whether to extend *Bivens*. Pet. Br. 32-33.[18] Indeed, *Monell*, cited by Respondent and the ACLU, relies on this analysis in holding that municipalities may be found liable under Section 1983. 436 U.S. at 690.

4. Respondent and the ACLU also completely misunderstand the point the Government is making in its analysis of Section 1983. As the Government explains, Section 1983 broadly imposes liability on any "person," including legal persons, and on anyone who "causes" another to be subjected to a constitutional violation. This language, illuminated by its legislative history and purposes, mandates the expansive reach of Section 1983, and its imposition of liability on entities that adopt unconstitutional policies, as well as individuals who violate the Constitution. *Bivens* actions, in marked contrast, are not based on a congressional text; instead, they are inferred by the courts only where necessary to deter natural persons from constitutional violations and provide remedies where none otherwise exists. For that reason, this Court has applied *Bivens* liability only to persons who directly participate in constitutional violations either by making or implementing unconstitutional policies.[19]

Carlson v. *Green*, 446 U.S. 14, 22 (1980) (availability of punitive damages); *Butz* v. *Economou*, 438 U.S. 478, 495-96 (1978) (qualified immunity).

[18] *Cf. Ngiraingas* v. *Sanchez*, 495 U.S. 182, 186-92 (1990) (relying on "person" analysis to hold that Section 1983 does not apply to territories); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 63-64 (1989) (relying on "person" analysis to hold that Section 1983 does not apply to States).

[19] *Wilson*, 526 U.S. at 614 (holding that the police violate the Fourth Amendment by bringing unnecessary third parties into a home when executing a warrant); *Carlson*, 446 U.S. at 16 n.1 (noting that plaintiff had

Moreover, the Court has never held *any entity* liable under *Bivens* for direct or indirect constitutional violations. See Gov't Br. 28-29 (citing cases).

5. The ACLU asserts that it is improper to treat State and federal prisoners held by private prison providers differently. But Section 1983 and *Bivens* often treat otherwise similarly situated defendants differently. For example, while municipal prisoners may sue the county jail under Section 1983, *Monell*, 436 U.S. at 690, federal prisoners cannot sue the equivalent federal agency under *Bivens*, see *Meyer*, 510 U.S. at 485.[20] The Court cannot and should not attempt to eliminate all potential inconsistencies, but, by refusing to extend *Bivens* to private entities, the Court can ensure that all *federal* prisoners enjoy the same rights. See Gov't Br. 9, 12, 23.

6. Finally, Respondent and his *amici* ignore what this Court has long recognized: while Congress is institutionally well-suited to enact broad remedies, the judiciary properly acts more cautiously in creating remedies. See Pet. Br. 33-34. Neither the text of nor the caselaw interpreting Section 1983—a comprehensive, congressionally enacted scheme—informs the Court as to the threshold question of whether extending *Bivens* to private entities acting under color of federal law is proper.

* * * * *

Bivens is a narrow gap-filler that this Court has refused to extend unless extension would fulfill the remedy's purposes and special factors do not counsel hesitation. *Meyer*, 510 U.S. at 486; Pet. Br. 7-8. Here, neither of these requirements

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claimed that the defendants "were deliberately indifferent to . . . serious medical needs").

[20] In fact, Section 1983 applies differently to various public entities. *Compare Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 690 (1978) (accepting Section 1983 liability for municipalities), *with Will*, 491 U.S. at 63-64 (rejecting Section 1983 liability for States), *and Ngiraingas*, 495 U.S. at 192 (rejecting Section 1983 liability for territories).

is met. Indeed, the proposed extension would both *undermine* deterrence of individual officers (be they policymakers or rogue actors) and distort federal fiscal and privatization policies. Accordingly, the Court should reject the Second Circuit's unwise extension of *Bivens* to private entities.

CONCLUSION

For the foregoing reasons and those stated in the opening brief and the brief of the United States, the decision of the court of appeals should be reversed.

Respectfully submitted,

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